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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-112

REA EXPRESS, INC., *Petitioner,*

v.

THE TRAVELERS INSURANCE COMPANY, et al,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ON BEHALF OF RAILROAD RESPONDENTS AND RESPONDENTS THE NATIONAL RAILWAY LABOR CONFERENCE AND THE EASTERN CARRIERS' CONFERENCE COMMITTEE

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This brief in opposition to the petition for a writ of certiorari filed by REA Express, Inc. to review the judgment affirming dismissal of plaintiff-petitioner's Complaint is filed on behalf of the railroad defendants-respondents identified in Attachment A and the defendants-respondents National Railway Labor Conference and Eastern Carriers' Conference Committee.

QUESTION PRESENTED

Whether the Court of Appeals and the District Court correctly concluded that the new owners of a company are barred by *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R. Co.*, 417 U.S. 703 (1974), from causing the company to bring suit against its former own-

ers and others attacking conduct alleged to have injured the company during the period it was a wholly-owned subsidiary of the former owners.

STATEMENT OF THE CASE

In 1928 and 1929 eighty-five of the nation's railroads organized the Railway Express Agency, Inc., later renamed REA Express, Inc. ("REA"), as a jointly-owned, non-profit facility to engage in the express transportation of goods as an agent for its railroad owners. Railroad ownership and control of REA were approved by the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act. *Securities and Acquisition of Control of Railway Express Agency, Inc.*, 150 I.C.C. 423 (1929). This relationship whereby REA was wholly owned by the railroads, implemented and administered under the supervision of the Interstate Commerce Commission, continued until the large majority of the railroad shareholders created a voting trust in June 1968 to facilitate a sale of the company, which had resulted in substantial losses to the railroads for a number of years.[1] The trustees of the voting trust brought in a new management team for REA in 1968 and early 1969, and in 1969 the new management group offered to buy the company through a corporate intermediary, the REA Holding Corporation, which they would form and control. A large majority of the railroad shareholders accepted immediately, and the sale was consummated in August 1969. Certain other railroad-owned shares were transferred to the Holding Corporation created by the new REA

[1] The history of the creation of REA and of the railroads' relationship to it over the years is reviewed in detail in *Railway Express Agency, Inc., Notes*, 348 I.C.C. 157 (1975).

management to hold formal title to the company during the following months. As a result of these transactions, the Holding Corporation acquired more than 99 percent of the REA stock for a price of slightly more than $2 million and certain warrants to purchase Holding Corporation stock, none of which was ever exercised.

More than two years later, in October 1971 the new owner of REA caused the company to bring this action seeking damages under a variety of federal antitrust and common law theories for injuries REA allegedly suffered between 1956 and March 1968 as a consequence of its participation in a group health and life insurance policy maintained pursuant to collective bargaining agreements for employees of the railroad industry. The Complaint, which was amended in insignificant respects in April 1972, named as defendants some but not all of the railroads which formerly owned all the stock of REA;[2] the National Railway Labor Conference and Eastern Carriers' Conference Committee, which acted as representatives for both REA and the railroads in administering the insurance policy; and The Travelers Insurance Company ("Travelers"), which was the insurer for the policy.

The most important aspect of this lawsuit for present purposes is that REA was a wholly-owned subsidiary of the railroads during the entire period in question. While the Complaint was brought in the name of REA, at the time suit was filed REA was owned by a new stockholder that had no interest whatever in the

[2] REA has never explained why some but not all of its former shareholders were named as defendants; venue or service of process considerations seem to explain the selection, however.

company at the time of the events complained of. The Complaint sought treble damages exceeding $75 million, and had the new owner prevailed it would have recovered a large multiple of its $2 million purchase price, in addition to keeping the company.[3]

The events on which the suit is based are as follows. A multi-employer collective bargaining agreement between the railroads and various unions representing their employees provided that certain group insurance benefits would be afforded to those employees during the term of the agreement. In fulfillment of that agreement, a single policy providing those benefits was obtained in 1955 from Travelers. From time to time thereafter, new collective bargaining agreements extended (and sometimes expanded) the obligation of the employers to provide group health and life insurance

[3] This lawsuit, moreover, represented only a small part of the riches that the new owners of REA have sought to reap from its former railroad shareholders. REA filed two other lawsuits against the same and other railroads in the Eastern District of Pennsylvania ("the Philadelphia action") and the Southern District of New York ("the New York action") seeking to recover well over $500 million in damages for the most part upon the basis of conduct of the prior owners during the time they owned REA. *See* REA Express, Inc. v. Aberdeen & Rockfish R.R., 412 F. Supp. 1239 (E.D. Pa. 1976); REA Express, Inc. v. The Alabama Great Southern R.R., 427 F. Supp. 1157 (S.D.N.Y. 1976). A partial summary judgment has been rendered in favor of the defendants in the Philadelphia action based upon the *Bangor Punta* doctrine as well as a number of other grounds. *See* 412 F. Supp. 1239 (E.D. Pa. 1976). The New York Court, per Judge Friendly, dismissed the New York suit for failing to state a claim upon which relief could be granted. 427 F. Supp. 1157. In addition, the New York Court affirmed a decision of the ICC adverse to REA that had been rendered in a related proceeding, and this has been summarily affirmed by this Court. *See* Railway Express Agency, Inc. Notes, 348 I.C.C. 157 (1975), 427 F. Supp. 1157 (1976), *aff'd*, —— U.S. —— (1977).

benefits for the represented employees, during the terms of the new agreements, and the insurance policy was revised and renewed for additional terms in accordance with those agreements.

REA became a participating employer in that insurance policy, at its request, pursuant to collective bargaining agreements made with certain of the participating unions, in 1956. As required by subsequent collective bargaining agreements, its participation continued, insofar as relevant here, until its withdrawal effective March 31, 1968 with respect to its employees represented by the Brotherhood of Railway and Airline Clerks, Freight Handlers, Express and Station Employees. In order to fulfill its collective bargaining agreement with that union, REA obtained a separate policy from Travelers providing identical benefits for those employees.

The theory of the Complaint, asserted under a number of antitrust and common law theories, in essence is that REA had been forced to pay excessive premiums during the period of its participation in the industrywide insurance policy in question, and that it had been stripped of a valuable asset—the supposed vesting of life insurance benefits which it was required by collective bargaining agreement to provide for certain of its retired employees—at the time of its partial withdrawal from the policy in March 1968. In fact, REA had paid exactly the same insurance premiums for each employee as each of its railroad owners had paid for its employees under the policy since, in accordance with the multi-employer collective bargaining agreement, the industrywide policy had at all times explicitly provided for uniform premiums payable by all participating employers. There was also scant basis for

believing that the policy was ever intended to provide for any "vested" life insurance benefits for retired employees. That point is immaterial here, but it is undisputed that the policy in all other respects provided for only "term," pay-as-you-go benefits during the period of an employer's participation, and the structure and background of the provisions in question compellingly indicate that that was the situation as to benefits for retired employees as well. A clarifying amendment to the policy in March 1968 confirmed that all coverage was on a "term," pay-as-you-go basis.

The Complaint sought recovery under Section 10 of the Clayton Act, 15 U.S.C. § 20, apparently on the theory that REA somehow purchased insurance from its railroad owners with whom it shared interlocking directors without competitive bidding. However, the railroad defendants were, like REA, purchasers not sellers of insurance; it is undisputed that REA had no interlocking directors with defendant-respondent Travelers, the seller of insurance coverage in this case.[4] REA also alleged that the defendants-respondents violated Sections 1 and 2 of the Sherman Act by somehow fixing the price of its insurance premiums and monopolizing and attempting to monopolize the business of insurance. This claim of price-fixing, upon which the petition focuses as the basis for distinguishing *Bangor Punta,* seemingly is based on the proposition that the

[4] In the New York action, REA had challenged a note transaction between REA and all its railroad shareholders for failure to employ competitive bidding. The court in that case, per Judge Friendly, ruled that Section 10 was not intended to reach such a transaction between a carrier and all the owners, and, on appeal, this Court affirmed. 427 F. Supp. 1157 (S.D. N.Y. 1976), *aff'd* —— U.S. —— (1977). Hence even if REA were somehow to be regarded as a purchaser of insurance from the railroads, its Section 10 claim is non-existent.

railroad owners of REA agreed with the insurance company on the premiums REA paid for insurance and, through their control of REA's board and management, required REA to participate in the policy. According to the petition, a Sherman Act combination "was involved each time the railroad-interlocking Board of Directors took action." (Petition at 15) A variety of common law theories, not involved in this petition, were also alleged.

After liberal discovery, the parties filed cross-motions for summary judgment and partial summary judgment in February 1975. Initially, the defendant railroads relied simply upon this Court's recent decision in *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R. Co.,* 417 U.S. 703 (1974); at the direction of the trial judge, their motion was enlarged to set forth all their grounds for summary relief. Defendant Travelers filed a similar motion at that time.

After extensive briefing of the issues and oral argument, the District Court (per Jones, J.) granted the defendants-respondents' motions for summary judgment on February 2, 1976, on the basis of the *Bangor Punta* doctrine. In doing so, the trial judge considered and rejected all the arguments which REA attempts to raise here. The District Court did not find it necessary to reach any of the defendants' other grounds for summary relief, including the failure of the Complaint to state a substantive antitrust cause of action, the bar of the statute of limitations, the preemptive effect of the ICC's pervasive regulatory jurisdiction over the conduct complained of, and the applicability of the labor exemption to the antitrust trust laws.

The Court of Appeals affirmed in a unanimous per curiam decision. It held that REA's federal claims "are

foreclosed by *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R. Co.*, 417 U.S. 703 (1974)." The Court of Appeals also affirmed the dismissal of REA's common law claims, but modified the judgment of the District Court to provide that such dismissal should be without prejudice. REA does not pursue the issue of its common law claims in this petition. The Court of Appeals noted that neither the insurance claims of former employees nor the claims of creditors were part of this litigation.

REASONS FOR DENIAL OF THE WRIT

The decisions below are in full accord with the established principles of law recognized by this Court in *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R. Co.*, 417 U.S. 703 (1974), do not conflict with this Court's recent decision in *Illinois Brick Co.* v. *Illinois*, 45 U.S.L.W. 4611 (1977), and present no appropriate occasion for the exercise of this Court's jurisdiction.

1. *Bangor Punta* Is Directly Applicable To And Controls This Case.

REA understandably slights the remarkable similarities between *Bangor Punta* and this case. There, as here, a new owner had acquired virtually all the stock of the plaintiff corporation after the events in question. There, as here, the new owner caused the plaintiff to bring suit under Section 10 of the Clayton Act and various common law theories for alleged instances of, in effect, waste and mismanagement. Damages substantially in excess of the purchase price paid by the new owner were also sought in *Bangor Punta*, though hardly of the magnitude of the premium sought here.

Faced with these facts and the prospect of a windfall recovery for the new owner, this Court held in *Bangor*

Punta that as an initial matter the new owner of the plaintiff corporation would have been barred from bringing suit by "the settled principle of equity that a shareholder may not complain of acts of corporate mismanagement if he acquired his shares from those who participated or acquiesced in the allegedly wrongful transactions." 417 U.S. at 710. The Court amplified this holding by noting that this principle has "special force where a shareholder purchases all or substantially all the shares of a corporation from a vendor at a fair market price" and then seeks to sue the former owner or owners for prior misconduct. *Id.* at 710 n. 5. Having concluded that the new owner of the plaintiff corporation could not itself have brought suit, this Court went on to hold that it would elevate form over substance to allow the new owner to achieve the same result by causing its newly-acquired company to initiate suit against the former owners. *Id.* at 713.

As both the Court of Appeals and District Court below concluded, these holdings are precisely applicable here. REA's determined efforts to outflank *Bangor Punta*, rejected by the courts below after thorough briefing and full argument, do not merit further consideration by this Court.

As far as the supposed interests of REA's creditors are concerned (*see* Petition at 8-9), REA, which had a profit in 1974, did not enter reorganization proceedings until 1975, more than three years after the filing of its Complaint, more than five years after the transfer of ownership and almost seven years after the last act of alleged wrongdoing.[5] The Complaint, not surpris-

[5] REA entered a reorganization proceeding under Chapter XI of the Bankruptcy Act in February 1975 and was adjudicated a bankrupt in November 1975. The last act of alleged wrongdoing

ingly, makes no attempt to plead a cause of action on behalf of creditors, and the extended period of discovery in this action correspondingly did not deal with any such issues—REA neither propounded discovery to substantiate such claims, nor did defendants have any occasion to embark upon discovery to refute any such never-advanced theories.[6] Accordingly, the District Court was correct in concluding that "this suit is not brought on behalf of creditors" (Petition, App. C at 17a), a conclusion correctly affirmed by the Court of Appeals (Petition, App. B. at 7a). To the extent creditors of REA might conceivably have some claim against the defendants-respondents, whose relationship with REA ended almost seven years previous to its bankruptcy, the Court of Appeals out of an abundance of caution indicated that such claims, if any, were not before the Court and were not being ruled upon. There is therefore no basis for this Court's intervention on this ground.

REA next notes that the plaintiff in *Bangor Punta* did not "contend that the purchase transaction was tainted by fraud or deceit," 417 U.S. at 710, and attempts to argue that this case is somehow different in

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complained of occurred in March 1968; the transfer of REA to its new owner was consummated in August 1969; and the Complaint was filed in October 1971.

[6] The Complaint did purport to be brought, as to at least one antitrust claim and several common law theories, on behalf of certain of REA's former employees. But these employees, even if they might somehow be regarded as creditors of the bankrupt REA today—a position which REA asserts as an *ipse dixit* with no evidentiary support or legal citation—they clearly were not such when the suit was commenced, nor for many years thereafter.

that respect (Petition at 10-11). Even REA is forced to concede, however, that the word "fraud" was not used in the Complaint (Petition at 10). Moreover, REA never contended or sought to establish below that "the purchase transaction was tainted by fraud or deceit," and an analysis of its present argument demonstrates that it does not in fact make such a contention here. It is the circumstances which allegedly gave rise to its causes of action, all of which occurred prior to March 31, 1968, which are now said to be the equivalent of "fraud" (Petition at 10-11), rather than the circumstances of the "purchase transaction." As noted in our Statement of the Case, REA was purchased by a holding company whose stockholders were officers of REA, and there is no evidence or claim that they were misled by the sellers in any way in regard to what they were buying.

The presence of defendants-respondents who were not former shareholders of REA also cannot deflect the force of *Bangor Punta,* and REA's attempts to invoke this fortuitous circumstance is unavailing (Petition at 11-12). Even if third parties participated in the conduct complained of by the former railroad owners of REA, the events in question nevertheless occurred at a time when REA was the wholly-owned subsidiary of the railroads named as defendants. As in *Bangor Punta,* this is a case where the prior owners are alleged to have participated in conduct which occurred before the transfer of ownership to the new owner, and which therefore injured only themselves. There is nothing in the reasoning of *Bangor Punta* to suggest that the presence of third parties should make any dif-

ference, and REA cites no authority in support of its argument.[7]

REA's attempt to resurrect a distinction between legal and equitable causes of action (Petition at 12-13) is no more than frivolous. *Bangor Punta* involved antitrust claims just as this case does, as REA is forced to acknowledge, *see* 417 U.S. at 706, 710. Whatever the basis for a distinction between legal and equitable causes of action when *Home Fire Ins. Co.* v. *Barber,* 67 Neb. 644, 93 N.W. 1024 (1903), was decided, any such basis for distinction has been eliminated by the merger of law and equity, as recognized by this Court and other Courts in applying the *Home Fire* doctrine without regard to whether alleged wrongs historically sounded in law or equity.[8]

The very argument raised by the petition as the keystone of its contentions—that equitable principles

[7] In deciding whether to dismiss charges of corporate mismanagement against insiders, courts have not in the past distinguished between circumstances where third parties were or were not involved. *See, e.g.,* Bloodworth v. Bloodworth, 225 Ga. 379, 169 S.E.2d 150 (1969) (dismissing derivative suit despite presence of third-party outsider as defendant) (cited in *Bargor Punta,* 417 U.S. at 710); Amabile v. Lerner, 166 A.2d 603 (N.J. Ch. 1960) (derivative suit dismissed although outside corporations profited from alleged wrongs by insiders); Myer v. Myer, 271 App. Div. 465, 66 N.Y.S.2d 83 (App. Div. 1946) (same).

[8] *See, e.g.,* Ford Tank Maintenance Co. v. Ford, 24 Misc. 2d 261, 203 N.Y.S.2d 542 (1960) (action for wrongful coversion); Capitol Wine & Spirit Corp. v. Pokrass, 277 App. Div. 184, 98 N.Y.S.2d 291 (1950), *aff'd,* 302 N.Y. 734, 98 N.E.2d 704 (1951) (action for misappropriation and waste); First State Bank v. Morton, 146 Ky. 287, 142 S.W. 694 (1912) (action alleging negligence by former corporate officer); Park Terrace, Inc. v. Burge, 249 N.C. 308, 106 S.E.2d 478 (1959); Molina v. Sovereign Camp, W.O.W., 6 F.R.D. 385, 399-401 (D. Neb. 1947).

should not debar the pursuit of antitrust claims—was explicitly raised and rejected by this Court in the *Bangor Punta* decision. 417 U.S. at 717 n. 13. And petitioner's claim that it is alleging a "classic" price-fixing offense (Petition at 7) contrasts sharply with the murkiness of the actual theory alleged (Petition at 4, 15)—*i.e.,* that the owners of an entity combine or conspire each time they act uniformly with regard to this entity.[9]

Finally, REA has neither alleged nor proven any facts requiring this Court to decide whether there should be a "continuing wrong" exception to the *Bangor Punta* doctrine (Petition at 14-15). All of the defendants-respondents' conduct of which REA complains occurred prior to the time the railroads sold their stock and the new owner took control. If REA paid excessive premiums or was deprived of the benefit of vested coverage for certain former employees, the deprivation took place well before the transfer of ownership. As the District Court observed, the new owners, as inside management, necessarily had knowledge of the transaction prior to determining their purchase price. If *Bangor Punta* is to have any effect, it must certainly prevent the new owners of a corporation from bringing suit on the rationale that a "continuing wrong" exists as long as any assets im-

[9] In the New York action, REA advanced a similar theory when it claimed a conspiracy to exist by reason of the owning railroads' agreement with REA and each other on interest rates to be paid by REA. The New York court, per Judge Friendly, stated that the contention "borders on the frivolous" and flatly rejected it. *See* 427 F. Supp. at 1166. Nor is petitioner's cause advanced by its belated and inarticulate efforts to suggest (Petition at 4), that somehow reinsurers were involved in "extending" the effect of the conspiracy.

properly taken are not returned. Any contrary result would represent not an exception to but a wholesale repudiation of this Court's decision in *Bangor Punta.*

2. The Issue Involved In *Illinois Brick* Had Nothing Whatever To Do With This Case.

Obviously perceiving the absence of any adequate basis to distinguish *Bangor Punta,* REA attempts to argue that this Court's recent decision in *Illinois Brick Co.* v. *Illinois,* 45 U.S.L.W. 4611 (1977), somehow justifies review of the decision below. REA never suggests any intelligible basis for such a claim, however. There is nothing whatever in the decisions in *Illinois Brick* to suggest a repudiation of the well established equitable principles recognized by the Court in *Bangor Punta,* principles which clearly bar REA from pursuing this action on its own behalf. To the extent that *Illinois Brick* might have any potential applicability whatever to those case, it would only stand as an additional barrier to any assertion of indirect claims by REA's creditors, in the event—contrary to the explicit findings of both courts below—that such claims were properly asserted and before the Court.

3. REA Has Suggested No Reason Why Summary Relief Was Inappropriate.

REA makes the predictable ritual incantations of the recognized doctrine that summary relief should be sparingly granted in antitrust actions where issues of motive and intent are controlling. It suggests no fact material to the decisions of the court below which was or is disputed, however. The facts demonstrating the applicability of *Bangor Punta* to this case are entirely undisputed. And in rejecting REA's efforts to invoke

supposed creditor interests to avoid the reach of *Bangor Punta,* the Court of Appeals and District Court did not improperly resolve any disputed factual issue, but rather correctly held that no such issues had been raised by the Complaint or otherwise placed before the courts below.

4. There Is No Basis For Granting The Petition For A Writ Of Certiorari.

There are no grounds for the issuance of a writ. The decision below is not in conflict with the decision of any other federal court, nor is there any suggestion of such conflict. As shown above, there is no basis for believing that the decision is in conflict with prior decisions of this Court or that there has been a complete departure below "from the accepted and usual course of judicial proceedings." Rules of the Supreme Court, Rule 19(1)(b).

Moreover, the circumstances of this case are highly atypical, involving transactions between a jointly-owned agency and all its owners, where the challenged interlocking relationship between the agency and its owners had been reviewed and approved by the Interstate Commerce Commission, and where the suit was brought solely because REA was thereafter sold to new owners. The issues presented for review are sui generis and there are thus no "special and important reasons" requiring review of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ATTACHMENT A

Railroad Respondents

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore & Ohio Railroad Company
Burlington Northern, Inc.
The Chesapeake & Ohio Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Northern Western Railway Company
Denver & Rio Grande Western Railroad Co.
Gulf, Mobile & Ohio Railway Company
Illinois Central Railroad Company
Louisville & Nashville Railroad Company
Missouri Pacific Railroad Company
Norfolk and Western Railroad Company
Richmond, Fredericksburg & Potomac Railroad Company
St. Louis-San Francisco Railway Company
St. Louis Southeastern Railway Company
Seaboard Coast Line Railroad Company
Southern Pacific Transportation Company
Southern Railway Company
The Texas & Pacific Railway Company
Union Pacific Railroad Company
Western Pacific Railroad Company